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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 418

NICHOLS & COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion (Pet. App. 1-20) and findings of fact (Pet. App. 20-74) of the Court of Claims have not yet been reported.

JURISDICTION

The judgment of the Court of Claims dismissing petitioner's claim was entered March 7, 1962. A motion for rehearing was denied on May 9, 1962. By order of July 26, 1962, Mr. Justice White extended the time for filing a petition for certiorari to September 6, 1962,

on which day the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Petitioner, an egg wholesaler, contracted with the Government to furnish eggs of a specified quality for use in the school lunch program. Government inspection and grading disclosed that large quantities of the eggs offered by petitioner were sub-standard and the eggs were accordingly rejected.

The principal question presented by this case is whether the Court of Claims correctly found, on the evidence before it, that the eggs were properly rejected as sub-standard and that there was, therefore, no breach of contract by the Government.

STATUTES AND REGULATIONS INVOLVED

The Act of August 14, 1946 [Agricultural Marketing Act of 1946] § 203, 60 Stat. 1087, 7 U.S.C. 1622 (1952), provided in pertinent part:[1]

> The Secretary of Agriculture is directed and authorized:
>
> * * * * * *
>
> (h) To inspect, certify, and identify the class, quality, quantity, and condition of agricultural products when shipped or received in interstate commerce, under such rules and regulations as the Secretary of Agriculture may prescribe, including assessment and collection of such fees as will be reasonable and as nearly as

[1] Amended subsequent to the time here pertinent by the Act of August 9, 1955 § 1, 69 Stat. 553, 7 U.S.C. 1622(h) (1958).

may be to cover the cost of the service rendered, to the end that agricultural products may be marketed to the best advantage, that trading may be facilitated, and that consumers may be able to obtain the quality product which they desire, except that no person shall be required to use the service authorized by this subsection. Any official certificate issued under the authority of this subsection shall be received by all officers and all courts of the United States as prima facie evidence of the truth of the statements therein contained.

7 C.F.R. 55.22-55.29 (1953) provided: [2]

§ 55.22 *When appeal grading may be requested.* An application for an appeal grading may be made by any interested party who is dissatisfied with any determination stated in any grading certificate, if the identity of the samples, or the product, has not been lost; and such application for an appeal grading shall be made within two days following the day on which the grading was performed. Upon approval by the Administrator, the time within which an application for an appeal grading may be made may be extended.

§ 55.23 *How to obtain appeal grading.* Appeal grading may be obtained by filing a request therefor (a) with the Administrator, (b) with the grader or inspector who issued the grading certificate with respect to which the appeal grading

[2] Now 7 C.F.R. 55.50-55.57 (1959).

is requested, (c) with the immediate superior of such grader or inspector, or (d) with the officer in charge of any office of grading. The application for appeal grading shall state the reasons therefor and may be accompanied by a copy of the aforesaid grading certificate or any other information the applicant may have secured regarding the product, at the time of grading, from which the appeal is requested. Such application may be made orally (in person or by telephone), in writing, or by telegraph. If made orally, written confirmation may be required.

§ 55.24 *Record of filing time.* A record showing the date and hour when each such application for appeal grading is received shall be maintained in such manner as the Administrator may prescribe.

§ 55.25 *When an application for an appeal grading may be refused.* If it appears to the Administrator that the reasons for an appeal grading are frivolous or not substantial, or that the quality or condition of the products has undergone a material change since the grading from which the appeal is made, or the identical products graded cannot be made accessible for regrading, or the act or this part has not been complied with, the Administrator may refuse the applicant's request for the appeal grading; and such applicant shall be promptly notified of the reason for such refusal.

§ 55.26 *When an application for an appeal grading may be withdrawn.* An application for appeal grading may be withdrawn by the applicant at any

time before the appeal grading is made upon payment, by the applicant, of all expenses incurred by the Service in connection with such application.

§ 55.27 *Order in which appeal gradings are performed.* Appeal gradings shall be performed, insofar as practical, in the order in which applications therefor are received; and any such application may be given precedence pursuant to §55.17.

§ 55.28 *Who shall make appeal gradings.* An appeal grading of any graded product shall be made by any grader (other than the one from whose grading the appeal is made) designated for this purpose by the Administrator; and, whenever practical, such appeal grading shall be conducted jointly by two such graders.

§ 55.29 *Appeal grading certificate.* Immediately after an appeal grading has been completed, an appeal grading certificate shall be issued showing the results of such appeal grading; and such certificate shall supersede the grading certificate previously issued for the product involved. Each appeal grading certificate shall clearly identify the number and date of the grading certificate which it supersedes; and such supersedure shall be effective as of the time of issuance of the appeal grading certificate. The provisions of §§ 55.18 to 55.21, both inclusive, shall, whenever applicable, also apply to appeal grading certificates except that copies of such appeal grading certificates shall be furnished each interested party of record.

STATEMENT

Petitioner, on March 5, 1954, filed its petition in the Court of Claims alleging, in five counts, causes of action with damages totalling over $1,000,000 arising out of its dealings with the Production and Marketing Administration (hereinafter referred to as PMA) of the United States Department of Agriculture (Pet. App. 1-2).

In Count I damages were claimed as the result of the alleged breach by respondent of five contracts for the delivery of approximately 58,000 cases of eggs to PMA in connection with the school lunch program. Petitioner alleged prejudice and partiality on the part of some of the inspectors who graded its eggs, refusal to inspect eggs tendered for delivery until they had been reworked, refusal to reinspect them when requested to do so, use of an improper candler in inspecting them, and other fraudulent, arbitrary, capricious and grossly erroneous actions (Pet. App. 1; Pet. 12).

Counts II, III and IV claimed damages resulting from the alleged failure of respondent to provide within a reasonable time, in accordance with the pertinent regulations, resident grading service in petitioner's egg breaking plant, approval of petitioner's cartons and labels used for marketing eggs, and resident grading service in petitioner's dressed poultry plant, respectively (Defendant's Brief and Exceptions to the Commissioner's Report 1, 2; Pet. 12).

The petition in the court below was thereafter amended to include Count V, in which damages were

claimed on the ground that the Department of Agriculture "unreasonably, arbitrarily, capriciously, fraudulently, and in bad faith," failed to make an impartial investigation of petitioner's complaints of improper grading, but, instead, sought evidence of wrongful conduct on the part of petitioner; attempted to coerce petitioner into foregoing its claim against egg dealer Weinberg Bros.; failed to furnish an adequate number of graders under the contracts; intimidated and interfered with honest egg graders, supplanting them with others who fraudulently and improperly graded petitioner's eggs; and repudiated its grading service contracts with petitioner, consenting to furnish further service only under terms which were, by comparison with other dealers, discriminatory to petitioner. (Pet. App. 1, 2; Pet. 15).

The court below made no findings with respect to Counts II, III and IV since the Commissioner of the Court of Claims had found, and petitioner had admitted on oral argument, that it had not made out a case on those counts (Pet. App. 1, 21)—or, at least, that it had been unable to prove "*full* damages" (Pet. 17).

Facts Pertaining To Count I

PMA, by announcement PY-61, dated April 15, 1952, offered to purchase, through competitive bids, approximately 500,000 cases of Government-graded oil processed shell eggs, of a specified quality, for use in the school lunch program (Ct. Cl. F. 4, Pet. App. 22-25). The pertinent provisions of PY-61 are set forth in Finding 4, and include, *inter alia*, a requirement that

the vendor, prior to delivery, arrange for Government inspection and grading of the eggs to be offered.[3]

Petitioner, one of the largest wholesalers of eggs in the United States (F. 1, Pet. App. 20; Pet. 10-11), submitted a bid pursuant to PY-61 which was accepted on June 19, 1952, as Contract A1PM(MF)2727 for 30 lots of eggs (15,000 cases of 30 dozen each) at an approved warehouse in Peoria, Illinois, for delivery in September and October, 1952, at a specified price (F. 8, Pet. App. 28).

A similar bid resulted in Contract A1PM(MF)2738, June 26, 1952, providing for delivery at Burlington, Iowa, of 24 lots of eggs in September, October, and November, 1952, at specified prices (F. 9, Pet. App. 28-29).

Sol Rich & Company also submitted bids resulting in Contracts A1PM(MF)2691, 2695 and 2732, which provided for delivery at Peoria and other cities of 96 lots of eggs, 64 lots as broker for petitioner (F. 10-13, Pet. App. 29-30).

Petitioner thereupon made arrangements for Government grading of the eggs which it intended to offer for delivery. Most of the eggs in storage at Peoria, and some at Burlington, Memphis and St. Louis, failed to meet the contract specifications because of loss in excess of the strict standards of PY-61 (F. 26-

[3] Pursuant to 7 U.S.C. 1622 and the Secretary's regulations thereunder, 7 C.F.R. Part 55, the Department, through PMA, provides inspection and grading services for egg and poultry dealers and processors whereby these commodities can be priced and traded under standard classifications (F. 2, Pet. App. 21). The grading is performed by a process of sample selection and candling, described in detail in Findings 18-22, Pet. App. 33-38.

28, Pet. App. 39-40). As a result, petitioner was required to rework [4] the sub-standard lots and obtain extensions of time for delivery, thus bringing into play the contracts' late-delivery penalty provisions (F. 15-16, Pet. App. 31-32).

Petitioner contended that the lots offered for inspection at Peoria failed to meet PY 61 requirements only because they were fraudulently undergraded by two of the Department inspectors, McCurley and Young (F. 17, Pet. App. 32-33; compare F. 29-32, Pet. App. 40-44). Petitioner did not avail itself of the appeal provided in the administrative regulations for egg dealers who, like petitioner, thought any particular grading was improper: 7 C.F.R. 55.22-55.29 (F. 32, Pet. App. 44). Nor did it invoke the formal provisions of the disputes clause incorporated by reference into the contracts here involved (F. 4-5, Pet. App. 22, 23, 25, 27; Pet. 40-42). Petitioner did, however, complain to Washington (F. 33, 36, Pet. App. 44-45, 46-47). Resultant investigation failed to substantiate petitioner's claim (F. 34, Pet. App. 45-46).

The damages sought under this Count consist of the costs of reworking the eggs and penalties for late delivery (Pet. App. 5).

Facts Pertaining To Count V

As already noted, the Department of Agriculture provides inspection and grading services for egg and poultry dealers and processors so that their commodi-

[4] Reworking required that petitioner's employees candle the eggs and replace those exceeding the loss tolerances with better eggs (See Pet. App. 4, p. 1).

ties can be priced and traded under standard classifications (F. 2, Pet. App. 21). PMA provides resident graders under grading service contracts with the dealers; these graders may be either Government employees (the so-called NACC graders) or licensed employees of the applicant, bonded to insure proper performance of their duties. The former are Civil Service employees paid by the Department, which is in turn reimbursed by the dealer. The salaries of the latter group are paid by the dealer himself and they are responsible directly to him (F. 43-44, Pet. App. 51-53).

Because of a personnel shortage after World War II, the practice of using licensed graders became quite prevalent. However, in May, 1952, PMA initiated a policy—explained in Instruction No. 918 (PY)-4—of utilizing NACC graders and substituting them for licensed graders. Where necessary, licensed graders would be permitted to assist NACC graders, but the latter were alone responsible for issuing the official Government grading certificate (F. 45-47, Pet. App. 53-56).

Petitioner entered into various contracts (to be distinguished from the Count I contracts) for resident grading services at its Avon and Bushnell, Illinois, plants during the period 1952-1955. The pertinent provisions common to each of these contracts are set forth in Finding 42, Pet. App. 50-51.

Petitioner's first NACC grader, Harry Brown, was assigned in May, 1952, to replace licensed grader Richter, and continued in that capacity until a shipment of eggs sold to Weinberg Bros. was found at its destination to be completely sub-standard, although it

had been given a relatively high grading by Brown. Brown was suspended and subsequently resigned. He was then hired by petitioner (F. 53-56, Pet. App. 59-62). During various periods thereafter, NACC graders Antoine, Schute, Kilian and Schoonover intermittently served petitioner, assisted by licensed grader Chambers. Mrs. Chambers' authority was limited, however, pursuant to the policy expressed in Instruction No. 918, *supra* (F. 50-52; Pet. App. 57-59).

Schoonover replaced Kilian in April, 1955. Petitioner had sent a letter to Washington in March of that year setting forth the results of an alleged statistical study of egg grading in the Chicago area and arguing that the results were indicative of fraud (Pet. 50; see F. 39-41, Pet. App. 48-50). Also in early 1955, petitioner had participated in the formation of the "Tri-State Poultry & Eggs Dealers Cooperating Marketing Plan" (F. 61-62, Pet. App. 64-65). An inspector from Washington assigned at that time to review operations in Illinois, Indiana and Missouri had arrived at Bushnell and Avon. Kilian's low temperature readings on certain egg lots were found to differ drastically from much higher readings there taken by the Washington inspector. Kilian was removed (F. 63-66, Pet. App. 65-66).

Kilian's replacement, Schoonover, was subsequently accused by petitioner of undergrading and being generally uncooperative. Petitioner took an appeal as provided in the regulations on only one of Schoonover's gradings, a lot under contract delivery to the Army. Army inspectors performed the appeal grading and

their results sustained the correctness of Schoonover's grading.

Finally, petitioner ordered Schoonover out of his plant. Dolson, Superintendent of the 12-State area that included Illinois (F. 48, Pet. App. 56), directed Schoonover to remove all Government inspecting equipment (F. 67-70, Pet. App. 66-69).

Petitioner then wrote to Washington requesting reconsideration of the situation, and replacement of Schoonover by inspectors more amenable to petitioner, or waiver of cancellation notice and cancellation of the contracts. Subsequent telegrams indicated greater insistence on the first alternative than on the latter, but PMA took him at his word and cancelled the contracts (F. 73-75, Pet. App. 70-72).

Shortly thereafter, petitioner began negotiations for reinstating grading services. The Department's offer of terms similar to those in the cancelled contracts was rejected (F. 76, Pet. App. 72-74).

Petitioner alleges that the actions taken by the Department of Agriculture, in connection with these grading contracts, are attributable to an attempt by Department officials to destroy petitioner's business. Damages measured by loss of profits were accordingly claimed by petitioner.

The Court of Claims, in rejecting petitioner's claims, declared (Pet. App. 3):

> In such [a heated] atmosphere, it is not easy to determine the true facts, but this we must do if we can, for, if the charges plaintiff makes are true, we have a case of outrageous official oppres-

sion, and positive dishonesty and fraud on the part of Government officers. If they are not true, plaintiff is to be severely condemned for making unsupported charges against Government officials and employees who were doing their duty.

The court in its opinion reviewed the inferences reasonably deducible from the incidents and conversations evidenced in the record (Pet. App. 1-20), made seventy-six detailed findings (Pet. App. 20-74), and concluded unanimously that, as a matter of law, petitioner was not entitled to recover. The petition was accordingly dismissed (Pet. App. 20, 74). A motion for rehearing was denied (Pet. App. 75).

ARGUMENT

This case turns upon questions of fact and inferences to be drawn therefrom and plainly does not merit review by this Court.

The Court of Claims held simply that petitioner had failed to sustain its burden of proving wrongful, discriminatory and fraudulent conduct on the part of Government officials in the alleged breach of the contracts involved. Petitioner is here attempting to reargue its case, presenting to this Court its view of the evidence, and asserting inferences which it favors but which have been rejected by the court below after a careful review of the whole record. As already noted, the evidence before the court below concerned (a) contracts for the sale of certain quantities of eggs by petitioner to the Department of Agriculture condi-

tioned upon the government's being satisfied that the produce met specified, strict inspection requirements, and (b) contracts under which the Department, through PMA, was to provide grading services for petitioner's Bushnell and Avon plants. The former contracts were entered into upon acceptance of petitioner's bid, and were performed, although this performance entailed additional preparation and late-delivery-penalty expenses, which were occasioned by original failure to meet the loss specifications. The grading service contracts, cancellable at the option of the parties, had a stormy life until cancelled by the government at petitioner's request.

Petitioner was constantly dissatisfied with the inspection results and the grading service. Yet it failed, with one exception, to utilize the appeal procedures explicitly made available in the applicable regulations, and failed to avail itself of the procedures in the disputes clause.

1. Primarily at issue here is the weight to be given to conflicting evidence. The burden of proof was on petitioner to establish by clear and convincing evidence that Agriculture officials were guilty of fraudulent conduct, since fraud is not presumed. See, *e.g.*, *Roosth* v. *Lincoln National Life Insurance Company*, 269 F. 2d 171, 179 (C.A. 5), certiorari denied, 361 U.S. 917; cf. *United States* v. *Thompson*, 279 F. 2d 165, 167 (C.A. 10); see also *United States* v. *Colorado Anthracite Co.*, 225 U.S. 219, 226-27. He did not carry that burden. Petitioner merely suggested certain inferences which the court rejected.

For example, petitioner asserts that the contrast in egg—grading results at the various delivery points, the actions and statements of Government officials, and the sequence of events amounted to clear proof of fraudulent and dishonest grading resulting from a conspiracy to bring economic ruin upon petitioner. But the court properly found that evidence inconclusive. It said (Pet. App. 6-7):

> This indicates, but does not prove, either that the inspectors at Peoria were, at least, too strict, or the other inspectors were too lenient, or, perhaps, the quality of the eggs offered was not the same, or the inspectors at one place happened upon better samples than at another. Also, the findings show that grading is often a matter of judgment; two impartial graders might well differ in grading the same case. This is especially true here where only five eggs out of 1,500 could cause the rejection of an entire lot. The variance indicates, however, that something was wrong somewhere. It raises a question in our minds, but a question, a suspicion even, falls far short of that clear and convincing proof necessary to prove fraud.
>
> * * * * *
>
> When we weigh the evidence pro and con, we must conclude that fraud in the grading of plaintiff's eggs has not been proven. In spite of McCurley's inquiry of Nichols about sales of eggs to him on credit, and Dolson's remark that plaintiff had better do what the Department directed him to do or they would put him out of business—in spite

> of this, we think that the most that can be said is that the inspectors required strict compliance with the contracts. We are not convinced that the inspectors required more than their duty demanded. Out of 86 lots rejected, 83 were rejected because the "dirties, leakers and loss" exceeded 3/10 of one percent. Since most of the initial offerings were of eggs that had not been reworked, and since the certificates issued when the eggs were put in the warehouse in the spring showed "dirties, leakers and loss" in excess of 3/10 of one percent, in the case of 40 lots out of 59, it is not surprising that later that fall 83 out of the 165 offered should have shown "dirties, leakers and loss" in excess of 3/10 of one percent.

Petitioner has failed to show that the evidence does not support the court's inferences.

The fact that contrary inferences might have been drawn does not impair the validity of those inferences or impugn the result reached. See, *e.g.*, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 342; *Labor Board* v. *Pittsburgh S.S. Co.*, 337 U.S. 656, 659-660; *Walling* v. *General Industries Co.*, 330 U.S. 545, 550; *Labor Board* v. *Nevada Copper Co.*, 316 U.S. 105; *American Flint Glass Wkrs. Union* v. *National Lab. R. Bd.*, 230 F. 2d 212, 215-16 (C.A.D.C.), certiorari denied, 351 U.S. 988. This principle is especially important where, as here, fraudulent, discriminatory motivation is sought to be proved by circumstantial evidence.

2. Equally significant is petitioner's failure to employ available administrative remedies. The regula-

tions, 7 C.F.R. 55.22-55.29 (1953), provided for appeal gradings and set forth the procedure therefor. Only once was this right utilized, with unfavorable results. Moreover the contracts of sale included the following disputes clause (Pet. App. 27):

> Article 22. Disputes. Any dispute concerning questions of fact which may arise under the Contract and which is not disposed of by mutual agreement, shall be decided by the officer executing the Contract in behalf of the Agency or by a designee of the Agency who shall reduce his decision to writing and mail a copy to the Contractor. Within 30 days from said writing Contractor may appeal to the head of Agency, whose decision or that of his designated representative shall be final and conclusive upon the parties. Pending decision of such dispute the Contractor shall diligently proceed with the performance of the Contract.

To be sure, petitioner did complain to local supervisors and to Washington, but it can scarcely be contended that the nature of the complaints and the manner in which they were made conformed to either the regulations or the disputes clause. Petitioner's failure to exhaust his available contractual and administrative remedies tends to confirm the correctness of the dismissal of petitioner's claims by the court below. *United States* v. *Holpuch Co.*, 328 U.S. 234; *United States* v. *Blair*, 321 U.S. 730, 734-737; *United States* v. *Callahan Walker Co.*, 317 U.S. 56, 61.

3. Petitioner's evidence of discrimination and dishonesty is wholly insufficient to warrant the finding

of a fraudulent pattern of operation breaching the school lunch contracts and a conspiracy to ruin it economically, culminating in cancellation and breach of the grading service contracts.[5] On this record it is perfectly clear that the court's rejection of the inferences of motivation advocated by petitioner did not amount to a denial of due process warranting review by this Court.

CONCLUSION

The evidence before the Court of Claims and its detailed findings adequately support its conclusion. There is no conflict of decisions or any other ground for further review. Accordingly, we respectfully submit that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General,

JOSEPH D. GUILFOYLE,
Acting Assistant Attorney General.

MORTON HOLLANDER,
DAVID J. MCCARTHY, JR.,
Attorneys.

SEPTEMBER, 1962.

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[5] The court did not suggest that Instruction No. 918(PY)-4 should have the effect of a rule, but only referred to it as an expression of an operative policy. Petitioner's argument on this point is completely answered by the grading service contract provision to the effect that "[a]t the sole discretion of PMA the graders may be either a Federal or State employee or a licensed employee of the applicant . . . ." (Pet. App. 50).

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